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Belgium: Trends and Developments

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BELGIUM

Trends and Developments

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Restructuring

The uncertain economic climate of the last few years has forced some companies to make in-depth reorganisations to ensure their financial strength, rationalise their production, and improve – among other things – their competitive capacity.

Two years ago, the trend regarding reorganisation was towards softer transformation approaches with future-proof and sustainable solutions, rather than focusing on collective dismissal.

Today, considering some of the latest restructuring announcements, one could ask if the current trend regarding reorganisation is still orientated towards soft transformation approaches or if it is leaning back towards collective dismissals, as the statistics published by the Employment Federal Public Service seem to confirm a rise in the number of collective dismissals since 2022.

Under Belgian law, a collective dismissal is a dismissal justified on economic or technical grounds and affecting a certain number of people over a certain period (in principle, 60 calendar days). If the conditions are met, and collective dismissal rules apply, then a specific procedure must be followed by the employer with several constraints and employees' protection at play, including a strict information and consultation procedure with the union representatives.

An analysis of the above-mentioned statistics published by the Employment Federal Public Service reveals that between January and December 2022, 61 collective dismissal intentions were announced, involving 3,075 employees, whereas between January and December 2023, 83 collective dismissal intentions were announced, involving 7,339 employees. This represents an increase of 26.5% in the number of announcements of intended collective dismissals between 2022 and 2023. This also represents a 138.7% increase in the number of employees involved in these intended collective dismissals between 2022 and 2023. The latest numbers published by the Employment Federal Public Service for the year 2024 provide that, between January and June 2024, 46 intentions of collective dismissal were announced, involving 4,532 employees. Since this is only over a six-month period, it appears to confirm the probability that the overall number of intended collective dismissals in Belgium will again rise between 2023 and 2024.

In this context, we also see a trend whereby some companies use the mechanisms set out in collective labour agreement No 32bis concerning the transfer of workers in the event of the takeover of assets after bankruptcy and in collective bargaining agreement (CBA) No 102 concerning the transfer of undertakings under judicial authority, instead of resorting to outright collective dismissal. These two collective labour agreements provide the possibility for potential buyers taking over (part of) the transferred business to choose which employees will transfer and continue to execute their contract post-transfer. On the other hand, CBA No 102 stipulates that the choice of workers taken over must be objectively motivated and not be based on a prohibited differentiation (eg, discrimination). However, no specific sanction is provided in the event of failure to comply with this rule. Since the principle of non-discrimination is a matter of public policy, it may be assumed that in the event of a breach of this principle, approval of the proposed transfer agreement could be denied. The purpose of these schemes is ultimately to preserve employment by ensuring all or part of the survival of the company's activities.

As is the case for a "regular" transfer of undertaking, the transferred employees' employment conditions will, in principle, automatically transfer. The automatic transfer of rights and obligations has a broad scope including all rights arising from the contract and the individual normative provisions of a collective agreement incorporated into the contract (rights and obligations generated in the employer/employee relationship beyond the period of validity of the collective labour agreement from which they derive). Pension, survivor's and disability plans, on the other hand, are, in principle, not covered by the automatic transfer. The collective employment conditions can however be amended through a collective negotiation. The delicate financial situation of the company being taken over – be it within the framework of bankruptcy or judicial reorganisation – provides negotiations leverage to exercise some pressure on the unions to reduce the terms and conditions of the workers being taken over. In addition, individual working conditions can of course be freely redefined between the contracting parties.

From Warrants to Bonus Pension Plans

From warrants…

Warrants are financial instruments available on the Belgian market which can be used by companies in Belgium as an alternative form of remuneration. The warrants are attributed freely by the employer to the employees and can be sold by the employees after a short blocking period (usually 24 hours), which limits the risk of market fluctuations.

The variable remuneration paid by means of warrants must however not exceed 20% of the employee's remuneration according to the Belgian tax authorities. If warrants exceed 20% of remuneration, the grant will be considered "disproportionate" and will be subject to social security contributions.

Remuneration taken into account for the calculation of the 20% rule = monthly gross remuneration x 12.92 (including holiday pay) + 13th month + variable gross remuneration (including warrants).

For the employees, the free grant of warrants will be taxed based on the last closing price before the offer date at the progressive tax rates (25% up to 50%), plus local taxes (varying from 0% to 9%). Besides that, warrants are, in principle, subject to tax on stock exchange transactions of 0.35% at the time of sale (with a maximum of EUR1,600). The tax is calculated on the sale amount excluding any brokerage fees or exit costs.

Capital gains realised upon the sale of the warrants are usually not taxable, as the employee will be able to claim that the sale took place within the normal management of their private wealth. The warrants are fully tax deductible for corporate income tax purposes.

The main benefit linked to the warrants is that they are not subject to employer and employee social security contributions (as they usually fall within the scope of the Law of 26 March 1999). Moreover, the employer does not need to pay the holiday pay (ie, 15.67% of the gross amount).

...to bonus pension plans

The popularity of warrants can therefore be explained by their more advantageous "employer cost to employee net salary" ratio than a cash bonus, and by the fact that many financial institutions have developed dedicated products (limiting stock market risk to a minimum).

As part of their tax reform project, it was however recently envisaged by the government to remove the possibility of allocating warrants in a way that was parafiscally advantageous. This has not come to fruition, however, and the advantageous regime for warrant plans continues to apply. That said, this system is now clearly in the legislator's sights and could, at any time, be modified in an unfavourable way.

As a result, we are seeing a certain reluctance on the part of companies to introduce new warrant plans, taking this parafiscal uncertainty into account, and leaning towards other alternatives, such as the pension bonus plan. In that instance, a share of a bonus budget or a percentage of the cash bonus is paid into the pension plan.

Given the collective nature of group insurance, the calculation of the premium must be general and identical for all employees belonging to the same category, to avoid discrimination issues. This does not mean that the amount must be similar for all employees in the same category. Distinctions may be made on the basis of objective and measurable criteria. The underlying targets which determine the bonus premium can be individual or collective but they cannot depend on management discretion.

Under the bonus pension plan, only an employer's contribution of 8.86% is due on the premiums, to which must be added insurance tax of 4.4%. A tax of 16.5% will be levied when the scheme member retires early. If the employee remains active until the statutory retirement age or reaches 45 pensionable years, the income tax is reduced to 10% (on the entire reserve, excluding profit sharing). Finally, the 80% rule must be taken into account, which sets certain individual limits.

Developments

Social Criminal Code

The purpose of social criminal law is to punish – by means of criminal penalties or administrative fines – breaches of labour and social security law. These breaches and corresponding sanctions were originally disorganised and scattered across a plethora of laws. In view of the obvious related disadvantages of such lack of organisation, a pressing need arose to codify it all, by means of a Social Criminal Code, which came into force in July 2011.

After more than ten years of practical application of the Code, and in response to certain requests from practitioners, changes were needed to update it and bring it into line with recent developments as part of the reform of the (ordinary) Criminal Code (ordinary law), as well as to make it even more effective in the fight against social fraud.

The main reforms are:

Sanction level

The Social Criminal Code has a specific sanction mechanism. There are four levels of sanctions, corresponding to four levels of seriousness, and all offences are classified within these four categories. Initially, the idea of adding a fifth level of penalty had been considered for the 2024 reform of the Criminal Social Code. However, the legislator abandoned this idea and the penalties remain divided into four levels. However, changes have been made to the amounts of certain fines: the amounts of the criminal fine and the administrative fine for level three penalties have been doubled and the maximum amounts of the criminal fine and the level four administrative fine have been increased. While the general trend is therefore towards greater severity, penalties for certain common offences committed by bona

fide employers will be reduced (eg, the keeping of part-time employment contracts or staff registers), while other offences have been removed (eg, using the proceeds of disciplinary fines for purposes other than benefiting workers).

Time limit for repeat offences

The time limit for repeat offences in criminal or administrative proceedings has been changed. From now on, the one-year time limit for repeat offences will be extended to three years. During this period, if the same offence is detected, the criminal or administrative fine may be doubled.

In the event of criminal prosecution, the new Code provides that the doubling is only possible for the criminal fine and no longer for imprisonment.

Social dumping

The concept of social dumping is not new, but has never before been included as such in legislation. Now, the concept of social dumping has entered the Code and is defined as "a wide range of deliberate abusive practices and circumvention of existing European and/or national legislation, including applicable laws and collective agreements, which allow unfair competition by minimising labour and exploitation costs through illegal means, and leading to the violation of workers' rights and their exploitation".

Aggravating factor

When the offence is punishable by a level four sanction, the fact that it was committed knowingly and wilfully constitutes an aggravating factor that must be taken into consideration by the competent administration when choosing the amount of the administrative fine for the level four sanction, and by the judge when choosing the sanction from among the level four sanctions and when choosing the specific criminal sanctions.

The new provisions of the Social Criminal Code came into force on 1 July 2024. However, certain provisions will take effect at a later date, set by law.

Extra-contractual liability

On 1 July 2024, the Law on Book 6 of the Civil Code was published in the Belgian official gazette. The new Book 6 replaces the old Napoleonic regime and brings the extra-contractual liability law back in line with contemporary needs and demands, as the legislation becomes clearer, more efficient and increases legal certainty. The reform is expected to have a profound impact on both businesses and individuals, including employers and employees.

For employers and employees, the most significant change brought about by Book 6 is the elimination of the quasi-immunity of the auxiliary. Under current law, an affected contracting party can bring an extra-contractual claim against the auxiliary only if the contractual default also constitutes a violation of the general standard of care, and causes more than purely contractual damage. In practice, this meant that the contractual fault also had to constitute a crime. Beyond that, since there is no contract between the auxiliary and the affected party, a contractual claim is inconceivable anyway. In other words, only in very exceptional cases could the auxiliary be addressed – this is the infamous quasi-immunity. This approach was set forth by the controversial 1973 "Stuwadoors judgment" by the Belgian Court of Cassation and is still in effect today. However, the contemporary legislator found this approach unjust, as in some cases the affected party was left out in the cold, with nobody against whom claims could be made.

This explains why, under the new regime, the premise is that an affected party will be able to choose between a contractual claim against its contractor (the employer) or an extra-contractual claim against the auxiliary (the employee). The affected party's options are thereby greatly expanded since the quasi-immunity is eliminated. However, this also means that employees, as auxiliaries, are at greater risk of liability claims. Fortunately, the new legislation is a supplementary law. The parties are therefore free to exclude or limit by contract their extra-contractual liability to a certain extent.

Statutory liability limitations of course also continue to apply. Similar to today, employees can, in principle, only be sued for fraud, serious fault or repeated minor fault.

The new regime is due to come into effect after 1 January 2025. Thus, to avoid unpleasant surprises, it is strongly recommended that existing and future contracts are adapted to this future reality to exclude extra-contractual liability claims as far as possible.

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